U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 July 2003

BALCA Case Nos.: 2003-INA-51 and 2003-INA-118[1]
ETA Case No.: P2002-FL-04385907

In the Matter of:

FLORIDA A&M UNIVERSITY,
Employer,

on behalf of

ULAS ERDEM,
Alien.

Appearance: Elizabeth Ricci, Esquire
Tallahassee, Florida

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER OF REMAND

This case arises from an application for labor certification[2] filed by Florida A & M University

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[1] On February 20, 2003, the Certifying Officer transmitted a "Supplemental Documents" file to the Board. The Docket section entered this submission with its own Case Number. The two case numbers are hereby consolidated for decision.

[2] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

Computer Systems Center for the position of Computer Research Specialist. (AF 21).[3] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File.

STATEMENT OF THE CASE

The Service Contract Act wage for a Computer Research Specialist is $38,251 a year. (AF 28). When the Employer filed its application for alien labor certification, with a request for reduction in recruitment ("RIR"), on February 1, 2002, it specified the wage offered as $39,155 a year in the ETA 750A. (AF 21). When the job was advertised and posted, however, a wage range of $35,740 to $97,200 a year was shown. (AF 23-27).

The CO issued a Notice of Findings on August 26, 2002. (AF 17-18). The CO found that the wage offer was unacceptable, as the lower end of the wage range was not within 5% of the prevailing wage. The NOF then stated:

> **Corrective Action Required:**
>
> Employer may rebut this finding by increasing the salary offer to equal or exceed the prevailing rate of pay, and re-advertise or he may submit countervailing evidence that the prevailing wage determination is in error. If the employer chooses to re-advertise, he must make that offer in writing - the employer is not to proceed with advertising until instructions are received from the State to do so.

(AF 18).

In response, the Employer submitted a revised Internal Posting of the vacancy announcement,

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[3] In this decision, AF is an abbreviation for Appeal File.

stating that it would be posted internally for thirty days. (AF 16). The revised posting showed a salary range of $36,338 to $97,200. (AF 15).[4] The Employer's rebuttal, however, does not expressly deal with the deficiency in the newspaper advertisement submitted in support of the RIR request.

The CO issued a Second Notice of Findings on October 25, 2002. (AF 11-12). The CO noted that the original advertised rate for the position had not been within 5% of prevailing wage. The CO also noted that the new posting raised an additional issue, in that a posting must contain a notice that the posting is in connection with the filing of an application for permanent alien labor certification, and provide an address for the local Employment Service Office and/or the Regional CO of the Department of Labor. The CO stated that evidence that this has been accomplished must be provided. Finally, the Second Notice of Findings stated:

> **Corrective Action Required:**
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> The employer must re-post the corrected job offer at its place of business, for an additional ten (10) days; after which the employer must provide a copy of the notice along with the dates it was posted and removed, and the number of applicants who responded.

(AF 12).

In response, the Employer provided a copy of a revised notice with the required language, and a statement proffering that the notice had been posted for ten days and that no applicants had responded. (AF 9-10).

The CO issued a Final Determination denying labor certification on November 29, 2002,

[4] Employer's attorney correctly argued that $36,338 is within the 5% of the "advertised" wage offer. (AF 14).

finding that neither rebuttal had addressed the issue of the salary advertised in the newspaper. (AF 2-3).

The Employer requested BALCA review on December 12, 2002. (AF 1) The Board issued a Notice of Docketing on January 21, 2003, and Employer filed its brief on appeal on February 7, 2003. In the brief, the Employer argues that it followed the NOF instructions exactly, and that dismissal of this case would be unduly harsh. On February 20, 2003, the Board received a file of "Supplemental Documents" submitted by Employer on January 3, 2003. These documents are identical to materials already in the original Appeal File, with the exception of Employer's attorney's January 3, 2003 cover letter.

DISCUSSION

An employer may rely on pre-filing recruitment efforts to support a request for a partial or complete reduction of post-filing recruitment efforts. To obtain a reduction, the employer must document that it has adequately tested the labor market, with no success, at least at the prevailing wage and working conditions. 20 C.F.R. § 656.21(i). In the instant case, the Employer's pre-filing recruitment was deficient in that it showed a wage range for the job, the low end of which was not within 5% of the prevailing wage. *See Sterling Management Systems*, 1989-INA-216 (Mar. 18, 1991). Accordingly, the CO properly raised the issue, and provided the Employer with the opportunity to agree to re-advertise under the supervision of the local employment service using a modified lower wage range. *See* 20 C.F.R. § 656.21(i)(5). A combination of the Employer's ambiguous rebuttal and the CO's misleading instructions, however, conspired to result in an outright dismissal of the application rather a simple denial of RIR request and remand to the local employment service for a supervised recruitment.

Specifically, the Employer's response to the first NOF should have been that it accepted the

CO's finding that the advertisement was deficient, and would agree to re-advertise.[5] Instead, the Employer resubmitted the original tear sheets from the newspaper advertising and provided a new internal posting with an acceptable lower wage range. This action is some evidence that the Employer accepted that its posting was deficient in not reflecting the prevailing wage rate at the lower end of the wage range, but failed truly to be responsive to the NOF's instructions.

Thus, the CO might have been in a good position following the first NOF to deny the RIR request based on the inadequate rebuttal, but chose instead to issue a Second NOF, which although repeating the finding about the original advertisement not showing a lower range wage within 5% of the prevailing wage, also raised – indeed focused on – a new issue about the new posting. The Second NOF did not mention what, if any, corrective action would be required as to the prevailing wage deficiency vis-a-vis the print advertisement. Rather, it only detailed what corrective action was required vis-a-vis the new posting.

Based on the record before us, we find that the Employer did intend to offer a wage within 5% the prevailing wage, but failed to understand that the print advertisement it presented for the reduction in recruitment request was not acceptable. The Employer's misunderstanding notwithstanding, we also find that, despite attempting to highlight the issue, the CO's NOFs did not adequately communicate to the Employer the problem with the RIR print advertisement and the method for solving the problem. *See Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996)(*en banc*) (NOF must be written so as not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted). Although it is clear that the CO was attempting to communicate the problem with the original advertisement, we find that the Second NOF may have been read by a reasonable person as requiring no more than compliance with the posting instructions in order for labor certification to be granted.

[5] Nothing in the Appeal File indicates any intention by the Employer to contest the SCA prevailing wage determination.

Accordingly, we affirm the CO's implicit finding that the application, as presented, was not sufficient to grant a RIR. In addition, however, we reverse the denial of labor certification and remand this application to permit the Employer to re-advertise under the supervision of a local employment service.

ORDER

The Certifying Officer's denial of a reduction in recruitment is **AFFIRMED**. The Certifying Officer's denial of labor certification, however, is hereby **REVERSED** and this matter **REMANDED** for further proceedings consistent with the above.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for

requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.